

**Written evidence submitted by Professor Louise Mallinder and Professor Anna Bryson,
relating to The Government's new approach to addressing the legacy of the past in
Northern Ireland inquiry**

[LPNI0016]

Executive Summary

1. The following information summarises the main points in our submission:
 - To be able to determine what is needed to facilitate effective reconciliation, it is first necessary to consider how reconciliation should be understood and what forms of reconciliation are needed to address the legacy of a violent past. This conceptual framing is also important in terms of monitoring progress towards this goal.
 - Reconciliation work is generally premised on the understanding that conflicts damage a range of different social relationships and that promoting reconciliation entails trying to repair those relationships.
 - Depending on the context, pursuing reconciliation may require working to improve working at multiple levels. This can include addressing horizontal relationships between victims and perpetrators, within communities, between communities, and in some instances, between states, as well as vertical relationships between a population and state institutions.
 - International criminal courts and human rights bodies have called upon states to adopt multilevel approaches to reconciliation and have also identified the key elements of a human rights based approach to reconciliation. They include that reconciliation work is inclusive; that it looks to the past as well as the future; and that it addresses the root causes of the conflict.
 - When we apply these elements to the creation and operation of the Independent Commission on Reconciliation and Information Recovery, we find that it has not been designed to effectively deliver reconciliation across multiple levels and that its early operations and public pronouncements have raised serious concerns about its potential to deliver human rights based reconciliation.
2. On the basis of these points, we recommend that the Northern Ireland Affairs Committee
 - Urgently considers whether or not the ICRIR, as currently designed and constituted, is capable of advancing human rights based reconciliation.
 - Request that the Northern Ireland Secretary of State reflect on the purpose of tasking the ICRIR with production of a historical record of conflict-related deaths and the potential of such a record to effectively contribute to reconciliation.
 - Request that the Northern Ireland Secretary of State provide information for the implementation of Part 4 of the Northern Ireland Troubles (Legacy and

Reconciliation) Act 2023. This should include timelines and detailed information on how the ‘designated persons’ will be appointed, and what forms of reconciliation the proposed activities are intended to advance.

- Request that the Northern Ireland Secretary of State provide clear and transparent information about the criteria for appointment of the academics appointed to take forward the Public History programme (as part of the government’s broader commitment to dealing with the legacy of the NI conflict)

Background and Introduction

3. The authors of this submission are senior academics with extensive research expertise in transitional justice and international human rights law.¹ For many years, this has included working individually and collaboratively with academic colleagues and civil society organisations on dealing with the legacy of the past in Northern Ireland.²
4. This written submission draws on research that we have conducted for an academic journal article. This article examines the relationship between reconciliation and international human rights law by analysing the case law and reports of international courts and human rights treaty bodies in light of multidisciplinary theory on reconciliation. It establishes that human rights institutions see reconciliation as a complex objective that should entail: the restoration of horizontal and vertical relationships; inclusivity in the design and implementation of measures to deal with the past; independent investigations and acknowledgement of past harms; and meaningful efforts to understand and address the root causes of conflict. The article applies these elements to the Independent Commission for Reconciliation and Information Recovery (ICRIR) in Northern Ireland to critically analyse its potential to fulfil its principal objective of promoting reconciliation. This article is currently undergoing peer review and as such, this written evidence is original and has not previously been published.
5. Our written evidence focuses primarily on the following question posed by the Northern Ireland Affairs Committee in its call for evidence: ‘What steps should the government take to ... facilitate an effective process for reconciliation?’ Our submission also speaks to three further questions posed by the Committee insofar as they relate to reconciliation. These are ‘whether the Government’s new approach meets the needs of victims, survivors and their families’; ‘what steps the government should take to ... introduce an effective process for recording a history of the Troubles’; and the feasibility of efforts to ‘reform and strengthen the Independent Commission for Reconciliation and Information Recovery’s (ICRIR) independence, powers and accountability’.
6. To answer the primary question, this submission explores the meaning of the term reconciliation and analyses the key elements of a human rights based approach to

¹ Further information on our research publications and activities is available on our QUB profile pages: <https://pure.qub.ac.uk/en/persons/anna-bryson> and <https://pure.qub.ac.uk/en/persons/louise-mallinder>

² Bryson is the current chair and Mallinder is the former chair of the Committee on the Administration of Justice (CAJ), an independent human rights organisation with cross-community membership in Northern Ireland and beyond.

reconciliation as set out in international case law. Each of these elements is discussed by drawing on the case law as well as analysing the design and operation of the ICIR.

What is effective reconciliation?

7. The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 provides that the principal aim of the ICIR is “promoting reconciliation”. However, the legislation and subsequent ICIR publications provide little clarity on how reconciliation is understood by the government or the ICIR. In addition, there is no publicly available information to suggest how its functions are intended to contribute to reconciliation.
8. To determine what is needed to facilitate effective reconciliation, it is first necessary to consider how reconciliation should be understood and what forms of reconciliation are needed to address the legacy of a violent past. This conceptual framing is also important for being able to monitor progress towards this goal. This section therefore draws on academic studies of reconciliation to consider these questions.
9. The concept of reconciliation has been theorized in rich bodies of work by theologians, sociologists, anthropologists, psychologists, and political scientists. A point of consensus among these literatures is that armed conflict or mass violence inevitably ruptures social relationships. The breakdown of relationships is often a trigger for the onset of conflict and the violence that follows significantly deepens mistrust and polarization. From this starting point, the purpose of reconciliation is viewed as reducing antagonisms so that relationships can improve and further violence can be prevented.³ This focus on relationships means that although reconciliation work can provide an important means for some individual victims to “reconcile themselves with—and in some sense make peace with—their past experiences”,⁴ initiatives that seek to only promote individualized healing are not generally regarded as working towards restoring relationships in a manner that is necessary to achieve social reconciliation.
10. Different levels of relationships are damaged during conflicts and it is therefore necessary for reconciliation to be pursued at different levels. This can involve working to improve horizontal relationships between victims and perpetrators, within communities, between communities, and in some instances, between states.⁵ Reconciliation also requires addressing vertical relationships between a population and state institutions.⁶ This form of reconciliation can be particularly significant where there are low levels of public trust in state institutions, as remains the case in Northern Ireland. Distinctions between horizontal

³ J.P. Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington, D.C.: United States Institute of Peace Press, 1997).

⁴ Seils, “The Place of Reconciliation in Transitional Justice” 5.

⁵ E. Daly and J. Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (Philadelphia: University of Pennsylvania Press, 2007).

⁶ G. Kelly, “Reconciliation in Northern Ireland”, in *The Palgrave Encyclopedia of Peace and Conflict Studies* (Basingstoke: Palgrave Macmillan, 2022).

and vertical reconciliation may become blurred where there has been collaboration or collusion between state and a variety of non-state actors.⁷

11. In contexts where there are low levels of trust in public institutions, vertical reconciliation often entails ensuring that states acknowledge where their policies, or the actions of individuals who acted on their behalf, violated individual or minority population rights. It also typically involves providing remedies for those violations and the implementation of reforms to prevent repetition and build the legitimacy of public institutions.
12. Given that violent conflicts rupture relationships on multiple levels, reconciliation work rarely entails rebuilding relationships on only one level. Delivering reconciliation at multiple levels is complex, particularly as activities that advance reconciliation at one level may do little to improve relationships at another.⁸ As a result, scholars tend to describe reconciliation as a multi-level, fluid, and evolving process that may need to be pursued through multiple mechanisms in a long-term process. For example, a truth and reconciliation commission's investigation of the causes and consequences of the violence often provides an empirical and moral base for these commissions to recommend to governments adopt measures to repair harms, prevent a repetition of the violence, rebuild trust in public institutions, and foster social reconciliation.
13. Reconciliation work should also be adapted to contexts in which it is intended to operate. However, as the following section explores, international criminal courts and international human rights bodies have identified in broad terms key elements that are necessary to deliver effective and human rights compliant reconciliation.

The Elements of Effective Reconciliation in International Human Rights Law

14. We have centred our analysis of what effective reconciliation is in international human rights law as the current government has repeatedly affirmed its commitment “to implementing mechanisms to address the legacy of the Troubles that fully comply with human rights”. It has also asserted that it “takes its human rights obligations - and its responsibilities to victims and survivors of the Troubles - extremely seriously”.⁹ In addition, the ICRIR Chair, Sir Declan Morgan, has asserted that the Commission will work to “promote rights-based reconciliation”.¹⁰
15. With respect to human rights in Northern Ireland, the case law of the European Court of Human Rights is regarded as a primary source for understanding the United Kingdom's obligations to address the legacy of the Troubles in a human rights compliant manner. This Court has referred to reconciliation in its case law, but it has yet to consider how this concept should be understood and implemented. However, as the European Court of Human Rights' case law relating to serious human rights violations often quotes the jurisprudence of other international courts and human rights bodies, it is instructive to

⁷ P. Seils, “The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions” (International Center for Transitional Justice, 2017).

⁸ Oettler, “Varieties of Reconciliation in Violent Contexts”, 322.

⁹ Northern Ireland Office, Written Ministerial Statement - Legacy - Northern Ireland (7 October 2024).

¹⁰ Declan Morgan, “Promoting rights based reconciliation”, *The Irish Times* (24 September 2024).

consider how these institutions have addressed reconciliation. This is particularly the case for UN human rights treaty bodies given that the UK has ratified almost all of the UN's human rights treaties and optional protocols.¹¹

16. We found that international case law makes clear that “human rights must be fully taken into account” in peace and reconciliation processes.¹² For example, the Inter-American Commission on Human Rights has contended that although “states have the right and duty to promote policies and implement programs whose goal is their people’s reconciliation”, when they do so, “certain international obligations must be observed”.¹³ Such statements demonstrate that human rights bodies have strongly normative visions of reconciliation as encompassing mechanisms to fulfil states’ duties to prevent future violations and to provide remedies for past harms.
17. We further found that international courts and human rights bodies have also articulated elements of a human rights-based understanding of the nature of reconciliation and how it should be pursued. Their interventions are generally premised on understandings of human rights as interdependent and indivisible, meaning that they recognize both physical and structural violations and they highlight the need for reconciliation to focus on social structures as well as individuals and institutions.
18. International human rights courts have framed the objective of reconciliation as restoring relationships at different levels in society. They have done this through calling upon states to pursue steps to foster dialogue and reconciliation among the various ethnic groups.¹⁴ In addition, several institutions have highlighted the need for reconciliation work to “rebuild trust among citizens and between citizens and public institutions”¹⁵ or to “build the trust of the population” in specific public institutions such as the judiciary.¹⁶
19. International courts and human rights bodies also focus on the need for states to adopt what academics have termed “thicker” forms of reconciliation. This aims towards creating deeper, more positive social relationships characterized by mutual acknowledgement, recognition, trust, and respect. Thick reconciliation aims to transform relationships at different levels in society and to “contribute to the restoration of dignity that may have been lost as a result of violations”.¹⁷ Transforming relationships to restore the dignity of those who have suffered from physical and structural violence is a core tenet of international human rights law. Indeed, some scholars contend that the protection

¹¹ The UK has ratified conventions on civil and political rights; economic, social and cultural rights; racial discrimination; torture; discrimination against women; children’s rights; and the rights of persons with disabilities.

¹² See for example, Committee on Economic, Social and Cultural Rights, ‘Concluding observations concerning the initial report of the Central African Republic’ UN Doc E/C.12/CAF/CO/1 (4 May 2018) para 10.

¹³ IACHR. *The Right to the Truth in the Americas*. OEA/Ser.L/V/II.152. Doc. 2. (13 August 2014), para. 83.

¹⁴ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined initial and second periodic reports of Djibouti, UN Doc CERD/C/DJI/CO/1-2 (15 September 2017) para 30.

¹⁵ International Criminal Court, Trust Fund for Victims’ First Report on Reparations, ICC-01/04-01/06 (1 September 2011) para 182.

¹⁶ Committee on the Elimination of the Racial Discrimination, Concluding observations on the fifth to the seventh periodic reports of Kyrgyzstan, adopted by the Committee at its eighty-second session (11 February–1 March 2013) para 6.

¹⁷ Seils, “The Place of Reconciliation in Transitional Justice”, 6.

and amplification of dignity “should be understood as the overall end to which international human rights law aims”.¹⁸

20. International case law emphasizes key elements of reconciliation that are necessary to achieve reconciliation. These are that reconciliation work be inclusive, that it effectively investigates past violations and injustices, and that it addresses the root causes of the conflict. The following sections explain how international courts have understood each of these elements and examines the extent to which the Independent Commission for Reconciliation and Information Recovery is able to deliver on them.

Inclusivity in Reconciliation Work as Necessary to Meet the Needs of Victims, Survivors, and their Families

21. Inclusivity is a major theme in writings on reconciliation, peacebuilding, and transitional justice.¹⁹ These literatures emphasize the importance of enabling victims and other stakeholders, particularly those who might otherwise be marginalized, to participate in public debates and policy decisions that inform the design, operation and evaluation of transitional justice and reconciliation processes.²⁰
22. Human rights bodies have repeatedly emphasized the importance of inclusivity to reconciliation and have called for the inclusion of diverse groups including victims, civil society, women, persons with disabilities, and young people in decision making processes and reconciliation work.²¹ This inclusion is viewed as necessary to ensure that reconciliation processes are viewed as legitimate, that diverse parts of society will be willing to engage with their work, and that their activities take into account the diverse ways the violence and structural injustices in the past can have enduring consequences for different social groups.
23. There was extensive consultation with victims and the wider public in the course of the 2007-2009 Consultative Group on the Past, the 2013 negotiations facilitated by Richard Haass and Meghan O’Sullivan, and the 2018 public consultation on the draft bill to enact

¹⁸ M. McManus, *Making Human Dignity Central to International Human Rights Law: A Critical Legal Argument* (Cardiff: University of Wales Press, 2019). See also G. Le Moli, *Human Dignity in International Law* (Cambridge: Cambridge University Press 2022); P. Gilibert, *Human Dignity and Human Rights* (Oxford: Oxford University Press 2018); C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19(4) *EJIL* 655-724.

¹⁹ H. Van der Merwe and N. Masiko, “Policy Brief: Addressing Diversity and Inclusion through Transitional Justice” (2022) <https://www.africaportal.org/publications/addressing-diversity-and-inclusion-through-transitional-justice/>; J.N. Clark, “Transitional Justice and Inclusiveness: Where Does Disability Fit In?” (2024) 18(2) *Journal of Intervention and Statebuilding* 139–60.

²⁰ J.E. Méndez, “Victims as Protagonists in Transitional Justice” (2016) 10(1) *International Journal of Transitional Justice* 1–5.

²¹ UN Human Rights Committee, Concluding observations on the initial report of Liberia, UN Doc CCPR/C/LBR/CO/1 (27 August 2018) para 11; CEDAW, Concluding Observations on The Third Periodic Report of Eritrea, UN Doc CEDAW/C/ERI/CO/6 (10 March 2020), para 15. See also CEDAW, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, UN Doc CEDAW/C/GC/30 (18 October 2013) para 42; UN Committee on Economic, Social and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights: Afghanistan, UN Doc E/C.12/AFG/CO/2-4 (7 June 2010), para 19; UN Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Ukraine, UN Doc CRPD/C/UKR/CO/2-3 (2 October 2024) para 65.

the legacy commitments in the Stormont House Agreement.²² By contrast, the previous UK Government did not meaningfully consult victims and survivors about the decision to unilaterally abandon commitments made in the Stormont House Agreement and to enact 2023 Legacy Act. The absence of inclusive consultation was a contributing factor to the widespread opposition to this legislation from victims, all of the main political parties in Northern Ireland, the Irish government, and international human rights experts.²³

24. While in opposition, the Labour Party pledged to reform and repeal the Legacy Act if elected. Within weeks of the Labour victory in the General Election in July 2024, the new Secretary of State for Northern Ireland, Hilary Benn, stated before Parliament that: “The Government will ... now undertake a period of consultation with interested parties, including victims and survivors, to seek their views”.²⁴ However, within the same statement, the Secretary of State pledged to retain the ICRIR and proclaimed that “the government had confidence” in the ICRIR’s ability to deliver justice, accountability, and information to victims and survivors of the Troubles. This fundamental decision was taken before the process of consulting victims formally began one month later. Despite professing the centrality of victims’ views to the government’s new approach, it appears that the most crucial and controversial decision regarding the retention of the ICRIR was taken before victims’ views were sought.
25. Those leading the ICRIR have emphasized that they are committed to giving victims and families as much involvement as possible in their work. However, a public survey that the ICRIR launched shortly after its Chief Commissioner was announced in May 2023 caused further frustration among victims who felt their views on the Commission itself were not being heard. For example, Paul Gallagher, a member of the Northern Ireland Victims’ Forum and trauma education officer at the WAVE Trauma Centre explained: “For me, it’s a bizarre circumstance now we’re being asked to fill in a survey to sort of rubber-stamp this fait accompli. I think it’s actually a cruel thing to ask people to do.”²⁵
26. A key test of the ICRIR’s record on inclusivity will, of course, be the willingness of victims of bereavement or serious injury to request that the ICRIR initiates a review. Early indications suggest that the commission is facing considerable challenges in engaging with victims. According to data and statements made public by the ICRIR, between it becoming operational on 1 May 2024 and early 2025, the ICRIR had opened

²² The 2018 public consultation on the draft bill to enact the legacy commitments in the Stormont House Agreement received 17,000 written responses, the majority of which indicated broad support for the proposed institutional framework.

²³ The Council of Europe Commissioner for Human Rights, Duna Mijatovic stated that she had “repeatedly warned that the Northern Ireland Troubles (Legacy and Reconciliation) Bill would undermine the human rights of victims, as well as truth seeking, reconciliation and justice efforts” and that “Serious concerns have also been expressed by the Council of Europe’s Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the UN High Commissioner for Human Rights, UN Special Rapporteurs, national human rights institutions, parliamentary committees and civil society organisations, including victims’ groups”, COE Commissioner for Human Rights, “United Kingdom: adopting Northern Ireland Legacy Bill will undermine justice for victims, truth seeking and reconciliation” (20 June 2023).

²⁴ Written Statement by Hillary Benn (29 July 2024) <https://questions-statements.parliament.uk/written-statements/detail/2024-07-29/hcws30>.

²⁵ “Troubles Legacy Bill: Public Survey on Controversial Body Opens”, *BBC News* (26 July 2023).

15 cases. In addition, in late 2024, it had received about 100 enquiries from victims.²⁶ This caseload contrasts sharply with the hundreds of legacy cases that were pending before civil and coronial courts, the Police Ombudsmen, and the PSNI Legacy Investigations Branch before they were closed by the Legacy Act. This suggests that the vast majority of victims are refraining from engaging with the Commission.

Understandings of the Past and the Challenges of a Single Historical Record

27. The European Court of Human Rights, like other international courts, has established that states have procedural obligations to effectively investigate violations of the right to life and the prohibition on torture and to provide reparations to victims. They have connected these obligations to reconciliation by contending that a failure to fulfil them may undermine reconciliation,²⁷ and by arguing that “truth is a precondition to reconciliation”.²⁸ The Inter-American Court has observed that in addition to laying the groundwork for criminal prosecutions, “Revelation of the atrocities committed during the armed conflict, set forth in an officially sanctioned account, will enable the people ... to reflect upon them, develop meaningful responses, and take steps to ensure peace for the future.”²⁹ The International Criminal Tribunal for the Former Yugoslavia made similar observations when it stated that: “Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation; for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process”.³⁰ It also contended that the revelation of truth by offenders publicly condemns the crimes³¹ and reduces the possibility revisionist denial narratives.³²
28. The views of courts and human rights bodies on the connection of truth to reconciliation relate to the work of truth commissions or international criminal prosecutions. As a result, they are premised on the truth about past violence being revealed and acknowledged in public proceedings, which in many instances are televised. Thus, they connect reconciliation to facts being uncovered and publicized by a formal and authoritative institution and they highlight the capacity of offenders’ public admissions of responsibility for violence to establish socially accepted truths about past violence. This connection of individual stories to social contexts plays an important role in ensuring that victims’ experiences are not individualized and depoliticized in ways that obscures how the context in which the violations took place shaped the forms and patterns of violence.

²⁶ ‘Troubles legacy body opens four new cases’, *BBC News* (11 November 2024).

²⁷ Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488, Ignacio Ellacuría, S.J. et al v El Salvador (22 December 1999) para 215.

²⁸ Inter-American Commission on Human Rights, ‘The Right to Truth in the Americas’ (Inter-American Commission on Human Rights, 2014), para. 109.

²⁹ IACHR, Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997, Chapter V, Guatemala, para. 28

³⁰ ICTY, Prosecutor v. Dražen Erdemović, Case No. IT-96-22-Tbis, Second Sentencing Judgment (5 Mar. 1998) para 21.

³¹ ICTY, Prosecutor v. Biljana Plavsic (Sentencing Judgement) (2003), para 76.

³² ICTY, Prosecutor v. Miroslav Deronji (Sentencing Judgement) (2004), para 260.

29. Situating individual experiences of harm within broad narratives of the past should not mean promoting one common or official history of past violence. Although there is of course immense value to careful investigative work that can uncover and provide official acknowledgement of facts in particular cases, academic studies of reconciliation generally argue that no society can create a fully inclusive and comprehensive narrative of the past. Indeed, efforts to do so risk asserting “an unrealistic and undesirable form of conflict denying social unity that, in reality, serves to pressure the politically weak to accommodate ... injustice”.³³ In contrast, understandings of reconciliation as rebuilding relationships generally make clear therefore that effective processes cannot be premised on one official narrative nor a small set of individual narratives. Instead, they should facilitate multiple contesting narratives, all co-existing within the public domain. The goal of reconciliation therefore is to find points of overlapping dissensus and to create spaces where individuals, communities and institutions are able to hear and respect the narratives of others.³⁴ A genuine reconciliation process should refrain from ensuring that one narrative dominates over others.
30. The ICRIR’s functions include carrying out “reviews” of deaths and other harmful conducts related to the Troubles, following a request from victims or designated public officials. This includes reviews into deaths where state actors or paramilitaries are believed to be responsible. These reviews should conclude with a published report that details the findings or a referral of the case for prosecution.³⁵ The ICRIR is also tasked with publishing a “historical record” of deaths, “which gives an account of the circumstances in which each of the relevant deaths occurred”. The extent to which each of these processes have the potential to produce inclusive narratives of the past that can contribute to reconciliation is explored in the remainder of this section.
31. The ICRIR’s Operational Design Framework indicates that the ICRIR’s information recovery work will be divided into three types of investigation: *focused investigations* that aim “to address questions that requesting individuals have raised”;³⁶ *liability investigations* that will seek “to establish all the circumstances of the death or other harmful conduct”; and *culpability investigations* that will seek “to establish all the circumstances of the death or other harmful conduct”, which can include “determining the acts of individuals and organisations”.³⁷ Only liability investigations would have the potential to be referred for prosecution.³⁸ The report also makes clear that the ICRIR will

³³ Lu, *Justice and Reconciliation in World Politics*, 183. See also

³⁴ S. Odak, “Theoretical Perspectives on Reconciliation”, in *Religion, Conflict, and Peacebuilding: The Role of Religious Leaders in Bosnia and Herzegovina* (Cham: Springer, 2021), 95–115; Demirel, “Re-Conceptualising Competitive Victimhood in Reconciliation Processes”.

³⁵ Time lapse and related evidential issues mean that it is widely accepted that it is very difficult to secure a successful prosecution in Troubles-related cases. See “Barra McGrory: Number of Troubles-related prosecutions ‘likely to be very low’”, *BBC News* (10 March 2016).

³⁶ The Operational Design Framework states that “Focused investigations do not have a comparable process in current systems and have been developed to reflect a need for specific information recovery even where there may have already been a successful prosecution, for example”. ICRIR, *The Operational Design Framework* (July 2024) 37.

³⁷ ICRIR, “The Operational Design Framework”, 36.

³⁸ ICRIR, “The Operational Design Framework”, 33.

have the sole discretion over which type of investigation to pursue. The ICIR can only seek to uncover information on conflict-related deaths and serious injuries when requested to do so by victims or designated public officials. The low numbers of victims making such requests suggests that the ability of the ICIR to publish reports that will contribute to inclusive narratives of conflict-related deaths and injuries is limited. This challenge is exacerbated by the Operational Framework which suggests that some reviews will only seek to answer the questions that individual victims raise, rather than delivering more effective investigations of the deaths.

32. The ICIR also has the function of producing and publishing “a record ... of deaths that were caused by conduct forming part of the Troubles”. This is intended to be a “single document which gives an account of the circumstances in which each of the relevant deaths occurred”. The Legacy Act provides that in producing this record, the ICIR should identify all conflict-related deaths and take reasonable steps to obtain publicly available information on these deaths as well as requesting information on them from individuals. The ICIR is not permitted to request information from family members of deceased persons, family members of persons whose death was caused by conduct relating to the event, or persons who were harmed in relation to a relevant conflict-related death. ICIR has to report on its progress towards promoting a historical record in its annual reports. The provisions in the Legacy Act relating to the historical record have not yet been brought into effect by the Secretary of State.
33. The language of the Legacy Act is narrower than the Northern Ireland Affairs Committee question on producing “an effective process for recording a history of the Troubles”. In focusing only on a historical record of conflict-related deaths, the report produced by the ICIR has the potential to duplicate existing academic and journalistic publications that document conflict-related deaths.³⁹ If this report largely duplicates information that is already widely publicly known, its potential to contribute to reconciliation will be limited. In addition, the language of the Legacy Act suggests that the report may take the form of a list detailing the circumstances of individuals deaths. Such a report may tell us little about the patterns and themes of the violence. Furthermore, unlike a more fulsome history of the conflict, it will do little to examine the causes of the violence nor explore the ways in which the violence affected the lives of many people in Northern Ireland. In particular, it will not provide a basis to examine and address the root causes of the violence.
34. Parallel to the creation of the ICIR, the previous UK government established a panel to commission an “official” or “public” history of British policy during the conflict in Northern Ireland to complement the mechanisms provided for in the Legacy Act. This could be viewed as an attempt to advance vertical reconciliation by enhancing understanding of the UK government’s role in the conflict. However, it is difficult to see

³⁹ For example, David McKittrick and others, *Lost Lives: The stories of the men, women and children who died as a result of the Northern Ireland troubles* (Mainstream Publishing Company Ltd, 1999); Joe Duffy and Freya McClements, *Children of the Troubles* (Hachette Books, 2019); Malcolm Sutton, *Bear in mind these dead ... An Index of Deaths from the Conflict in Ireland 1969-1993* (Pale Publications 2002); Michael McKeown, *Post-Mortem: An examination of the patterns of politically associated violence in Northern Ireland during the years 1969-2001* (June 2009). <http://cain.ulster.ac.uk/victims/mckeown/mckeown01.pdf>

the reconciliation potential of this programme of work given the controversial context in which it was established. That those leading it were hand-picked by the Secretary of State for Northern Ireland resonates uncomfortably with the desire expressed by Ministers in the previous governments during the development of the Legacy Act to control of the narrative of what happened in the past and to “halt the rewriting of history”.⁴⁰

35. One of the co-chairs of the panel to commission the official history welcomed the Government’s intention to commission this work “via a transparent and rigorous process and following extensive consultation with the academic community.” In the interests of transparency, it is imperative that the details of this consultation process and the criteria for the selection of academics who will be granted privileged access to government files are made public. There is, of course, a long history of trusted academics being granted special access to British government files. However, the scale and sensitivity of this investment of public money inevitably calls for a significantly higher level of scrutiny.

Addressing the Root Causes of the Violence

36. Several international courts and human rights bodies have emphasized the importance of addressing the root causes of the violence for promoting reconciliation. For example, the UN Committee on the Elimination of Racial Discrimination has called upon states to “acknowledge the historic discrimination” committed against marginalized minority groups and to “study the root causes of that discrimination and its multifaceted impact on those groups”.⁴¹ In addition, the UN Committee on Economic, Social and Cultural Rights, when calling on states to take human rights in account when pursuing peace and reconciliation observed that: “a recognition of economic, social, and cultural rights may alleviate some of the underlying causes of the conflict, such as inequalities of treatment between different parts of the national territory and between different sectors of the population”.⁴²
37. Addressing the root causes of conflict through reversing or reducing structural injustices within reconciliation work means not only refraining from discriminatory practices but also taking steps to end marginalization and provide reparation for the harms that have been inflicted in the past and which often have consequences that endure into the present. International human rights bodies called on states to adopt a range of measures to achieve this, which vary depending on the context. For example, the Committee on the Elimination of Racial Discrimination in its concluding observations on Mauritius recommended the implementation of truth commission recommendations including “the

⁴⁰ In April 2024, the UK government established an Expert Advisory Panel to provide guidance and advice to historians working on the project. See “Expert Advisory Panel for Public History of British Policy During the Northern Ireland Conflict, Terms of Reference”

https://assets.publishing.service.gov.uk/media/662a163a55e1582b6ca7e532/Expert_Advisory_Panel_TOR.pdf

⁴¹ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined 15th to 21st periodic reports of Iraq, UN Doc CERD/C/IRQ/CO/15-21 (22 September 2014) para 6. See also UN Committee on Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Ukraine, UN Doc CPRD/C/UKR/CO/2-3 (2 October 2024), para 65.

⁴² UN Committee on Economic, Social and Cultural Rights, Concluding observations concerning the initial report of the Central African Republic, UN Doc E/C.12/CAF/CO/1 (4 May 2018), para 10.

establishment of an intercontinental slavery museum and addressing all land dispossession and ownership claims, with a view to fostering reconciliation”.⁴³ In a report on Iraq, it called on the state to take measures to protect the diversity of languages, religions, ethnicities and cultures,⁴⁴ and in a report on Sudan, when calling on the state, “as a matter of priority, to embark on a national reconciliation process among all ethnic groups and parties to the conflicts” observed that this process should “integrate the principles of equality and non-discrimination in all its initiatives and plans” in order to “foster a culture of tolerance and mutual respect”.⁴⁵

38. In these examples, UN human rights treaty bodies are focusing on specific societies and highlighting the root causes most relevant to them. There are nonetheless some connecting threads. They indicate, for example, that a human rights-based approach to reconciliation should address root causes in an inclusive manner that recognizes how different groups in society may have been or continue to be impacted in different ways. In addition, they indicate how doing this fulsomely requires engaging with socio-economic rights as well as civil and political ones. In contexts where the post-conflict landscape is characterized by high levels of deprivation and alienation within parts of society which can be connected to the violence and discrimination that preceded or was part of the conflict, reconciliation work should acknowledge how these harmful conditions in the present are connected to the past and should to deliver measures to alleviate these problems in order to ensure inclusive future relationships based on dignity and equity.⁴⁶
39. The ICRIR has not been given a mandate to examine or address the root causes of the violence. Instead, its individualized reports and historical record are viewed as the final products, rather than as an evidence base on which to repair harm, prevent a repetition of violations, or develop the work of reconciliation.
40. Part 4 of the Legacy Act (“Memorialising the Troubles”), which is yet to enter into effect, provides initiatives that would operate in parallel to the ICRIR, namely oral history, a memorialisation strategy, and academic research on the patterns and themes of the conflict. These initiatives could provide scope for broader analysis of the complexity of ruptures in relationships across society and a blueprint for non-recurrence. However, as we have argued previously with regard to the Oral History Archive proposed under the Stormont House Agreement⁴⁷ and more recently in relation to the public/official history discussed above,⁴⁸ the independence of those appointed is of paramount importance.

⁴³ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined 20th to 23rd periodic reports of Mauritius, UN Doc CERD/C/MUS/CO/20-23 (19 September 2018), para 17.

⁴⁴ UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined fifteenth to twenty-first periodic reports of Iraq, UN Doc CERD/C/IRQ/CO/15-21 (22 September 2014) para 6.

⁴⁵ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twelfth to sixteenth periodic reports of the Sudan, UN Doc CERD/C/SDN/CO/12-16 (12 June 2015).

⁴⁶ Seils, “The Place of Reconciliation in Transitional Justice”, 6–7.

⁴⁷ See, for example, A. Bryson (2015) The Stormont House Oral History Archive, PRONI, and the Meaning of Independence <http://rightsni.org/2015/10/the-stormont-house-oral-history-archive-proni-and-the-meaning-of-independence-guest-post-by-dr-anna-bryson/>

⁴⁸ See “‘State-directed’ Public History of Troubles ‘Lacks Credibility’”, *Times Higher Education* (3 May 2024); “Critics Question British Government’s ‘Public History’ of the Troubles Project”, *Irish News* (25 April 2024)

41. The processes to be created according to Part 4 of the Legacy Act should aim to address reconciliation across multiple levels. However, the Legacy Act at present directs them towards only inter-communal reconciliation. This emphasis can be seen in the connection of reconciliation to anti-sectarianism, and non-recurrence of political and sectarian hostility between people in Northern Ireland.⁴⁹

The Feasibility of Reform of the ICRIR

42. Gready has suggested that one of the enduring lessons from the South African transition is the need for conceptual clarity at the outset: “The lesson is: consider your objectives, define your keywords, and then design your institution accordingly”.⁵⁰
43. Drawing on international human rights case law and multidisciplinary literature, we have outlined above the core requirements for a “thicker” form of human rights based reconciliation. They include the need to: restore both horizontal and vertical relationships; meaningfully involve victims at each and every stage of the process; to examine past violence in an inclusive manner; and to address the root causes of the conflict.
44. When judged against our framework for a human rights-based approach to “thick” reconciliation, it is clear that there are substantial reasons to be concerned about the Commission’s ability to deliver on its prime objective. These challenges to some degree originate in the controversial circumstances in which the ICRIR was created, but they also arise from the concerns about how the ICRIR is engaging with victims, the scope of its investigative framework, as well as ongoing concerns about the capacity of the Secretary of State for Northern Ireland to veto what information it can disclose. In addition, contrary to the repeated statements of human rights courts and treaty bodies that reconciliation requires examining and addressing the root causes of the conflict, the ICRIR has no mandate to undertake this work.
45. As the current British and Irish governments grapple with the prospect of root and branch reform of the ICRIR, a key question is whether or not certain aspects of the Commission can be “fixed” or at least improved. We fully acknowledge that it would be naïve to pin on the ICRIR sole responsibility to deliver on all aspects of a “thicker” reconciliation process. However, we would contend that hasty, partial and ill-defined approaches to reconciliation are not cost-neutral. Rather they are a breeding ground for cynicism, detachment and retraumatisation – the antithesis of the type of “thick” reconciliation required by international human rights law.

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⁴⁹ Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, s 54.

⁵⁰ P. Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa* (London: Routledge, 2010) 2.